



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF M-, INC.

DATE: JAN. 12, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software and data sharing firm that caters to real estate brokers, seeks to employ the Beneficiary as a director of engineering, and classify him as a member of a profession holding an advanced degree or an individual of exceptional ability (EB-2 classification). *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center erroneously denied the petition, by concluding that the Beneficiary was ineligible for classification as a professional with a baccalaureate degree (EB-3 classification),¹ when the Petitioner sought to establish the Beneficiary's eligibility under the EB-2 classification as an individual of exceptional ability.

On appeal, the Petitioner submits a brief and an additional copy of the evidence previously provided to the Director at the time of filing the petition.

Upon *de novo* review, we will sustain the appeal.

I. LAW

Second preference immigrant visas are available for qualified individuals who are advanced-degree professionals or who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States. Section 203(b)(2) of the Act. Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2).

Every petition under this classification must include one of the following three items: (1) an individual labor certification from the Department of Labor, (2) an application for Schedule A designation, or (3) documentation to establish that the beneficiary qualifies for one of the shortage

¹ *See* section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). The third-preference, employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

occupations in the Department of Labor's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i).

II. ANALYSIS

The Director in denying the petition did not consider whether the Beneficiary was qualified for the EB-2 visa classification, or whether he met the job requirements specified in the labor certification submitted in support of the petition. On appeal, we find that the evidence in the aggregate is sufficient to show that the Beneficiary qualifies for the benefit sought on his behalf.

A. Exceptional Ability under 8 C.F.R. § 204.5(k)(2)

To meet the definition of "exceptional ability," the regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides that a petitioner must submit sufficient evidence that meets at least three of the six criteria detailed therein. The list include evidence showing that the beneficiary possesses at least 10 years of full-time experience for the occupation being sought; evidence that he has commanded a salary or other remuneration for services, which demonstrates exceptional ability; and, evidence of membership in professional associations.

The Petitioner wishes to permanently employ the Beneficiary as a director of engineering, specializing in software development that focuses on creating data sharing products for use by real estate brokers. It maintains that he has met at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and thus qualifies an individual of exceptional ability. We agree.

To meet the requirements of 8 C.F.R. § 204.5(k)(3)(ii)(B), the record contains letters from current and former employers indicating that he has at least 10 years of full-time work experience in the occupation sought, specifically as a programmer analyst, software engineer, and ultimately as a director of engineering. The record contains sufficient evidence of the Beneficiary's employment activities within the field of software engineering to meet the 10 year experience requirement. Therefore, he has met this criterion.

The plain language of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires the submission of evidence that the Beneficiary has commanded a salary or other form of compensation for his services at a level which demonstrates his exceptional ability. The Petitioner has provided evidence of the Beneficiary's salary and corresponding wage data from the Department of Labor's Foreign Labor Certification Data Center's Online Wage Library for the years 2011 through 2015. This wage library relies on the Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) wage estimates.² The Petitioner has submitted employment data and wage data for the software engineer

² See <http://www.flcdatcenter.com/casedata.aspx>. See also http://www.bls.gov/oes/oes_emp.htm#estimates.

The OES program collects data on wage and salary workers in nonfarm establishments in order to produce employment and wage estimates for about 800 occupations. The BLS produces occupational employment and wage estimates for over 450 industry classifications at the national level.

occupation in the metropolitan statistical area for the intended employment, [REDACTED] California. The Petitioner highlighted that the Beneficiary received a salary that exceeded the wages paid at the highest skill level for the occupation in 2011 through 2015 by 12-40% each year. Additionally, it submitted evidence that the Beneficiary received company stock options from his employers during this timeframe. Based on this evidence, we conclude he has met this criterion as it is more likely than not that the Beneficiary commanded a salary that is indicative of his exceptional ability in the occupation.

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(E) involves the submission of evidence of the Beneficiary's membership in professional associations. The record contains material that shows he holds membership in two professional organizations, the [REDACTED] and the [REDACTED], and so meets this criterion.

In light of the above, the record includes sufficient documentary evidence that the Beneficiary meets at least three of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii). The Petitioner has shown the Beneficiary to be an individual of exceptional ability in the sciences.³

B. Qualifying Work Experience

A petitioner must establish a beneficiary's possession, by a petition's priority date, of all DOL-certified job requirements. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).⁴ In evaluating a beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

The terms of the labor certification allow an applicant to qualify for the job offered with ten years of work experience in either the proffered position, or in alternative occupations as a programmer analyst, or a software engineer. The Petitioner has provided letters from current and former employers that show the Beneficiary meets the work experience requirements through his employment in the field of software engineering. The labor certification also requires that an applicant for the job must command a salary which demonstrates exceptional ability, and hold membership in professional associations. As previously discussed, the Beneficiary meets these additional job requirements as well. Therefore, we

³ The Petitioner maintains that the Beneficiary also meets the requirements of the criterion at 8 C.F.R. § 204.5(k)(3)(ii)(F). However, since the Beneficiary has already met at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), an analysis of this fourth criterion is moot.

⁴ This petition's priority date is June 29, 2013, the date the DOL received the instant labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). In this case the Beneficiary may be eligible to retain his priority date from a previously approved petition conferring a priority date of May 29, 2006. *See* 8 C.F.R. § 204.5(e) (explaining how to determine whether a beneficiary may retain a previously accorded priority date).

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conclude that the Beneficiary has met the requirements of the position. *See* 8 C.F.R. § 204.5(a)(2), (k)(4).

III. CONCLUSION

The Petitioner has established that the Beneficiary qualifies as an individual possessing exceptional ability under section 203(b)(2) of the Act.

ORDER: The appeal is sustained.

Cite as *Matter of M-, Inc.*, ID# 760341 (AAO Jan. 12, 2018)